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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CLYDE C. RANDOLPH, JR., *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal From the United States District Court for the Middle District of North Carolina

JURISDICTIONAL STATEMENT

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---

JURISDICTIONAL STATEMENT

The appellant, Clyde C. Randolph, Jr., appeals from a Decree of a three-judge District Court of the United States District Court for the Middle District of North Carolina entered on September 11, 1967, dismissing his action, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

(a) OPINION BELOW

The opinion of the United States District Court for the Middle District of North Carolina, which is not yet reported, is set forth in Appendix A, *infra*, pages 1a-7a.

(b) GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This action is brought under the provisions of Title 28 U.S.C., Sections 1331, 1346(a)(2); the Due Process of Law clause of the Fifth Amendment to the Constitution of the United States; Article III, Section 2 of the Constitution of the United States of America; Article I, Section 1, of the Constitution of the United States of America. This action is for injunctive relief on grounds of repugnance to the Constitution of the United States, and thus falls under 28 U.S.C.A., Section 2282. Appeal to this Court is taken pursuant to 28 U.S.C.A. 1253.

(ii) Appellant seeks review of Order dismissing his action entered September 11, 1967, in the United States District Court for the Middle District of North Carolina, a copy of which is hereto appended as Appendix B, page 8a. Notice of Appeal to this Court was filed in the United States District Court for the Middle District of North Carolina on October 10, 1967.

(iii) Jurisdiction is conferred upon this Honorable Court under the provisions of 28 U.S.C.A. 1253.

(iv) Cases believed to sustain jurisdiction.

Appeal lies to the Supreme Court from Orders of a District Court refusing to grant injunctions in suits to restrain the enforcement of Orders of administrative agencies. *Fleming* v. *Rhodes*, 311 U.S. 100, 67

S.Ct. 1140, 91 L.Ed. 1368 (1947); *Stafford* v. *Wallace*, 258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735, 23 A.L.R. 229 (1922). In a suit to restrain the enforcement of an administrative Order, appeal lies, under 28 U.S.C.A. 1253, to review a Decree dismissing the Complaint. *Morgan* v. *United States*, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936), mandate granted, 56 S.Ct. 952.

In two recent decisions, this Court has held that attempted *state* regulation of the rights of citizens to employ attorneys could not be sustained where such regulations had the effect of infringing on liberties guaranteed by the United States Constitution. *National Association for the Advancement of Colored People* v. *Button*, 371 U.S. 415, 83 S.Ct. 828, 9 L.Ed. 2d 405 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed 2d (1964), rehearing denied, 377 U.S. 960, 84 S.Ct. 1625, 12 L.Ed. 2d 505. In the present appeal, the appellant seeks to present for review the related question as to the Constitutional validity of unreasonable restrictions upon employment of private attorneys that are now imposed by the legislative and administrative branches of the Federal Government.

Plaintiff has standing to maintain this action in that he is subject to criminal prosecution under the provisions of 42 U.S.C.A. 406, which declares in part, that any person who charges or collects, or who attempts to charge or collect, any fee in a Social Security case in excess of the maximum prescribed by the Secretary of Health, Education and Welfare shall be guilty of a misdemeanor and punished by a fine of $500.00 or imprisonment not exceeding one year, or both. Appellant further has standing to maintain this action and to raise the Constitutional rights of those persons with

whom he has or may have a professional relationship. *Griswold* v. *Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965). Moreover, the Constitutional rights of those persons who have claims for Social Security benefits are properly assertable by appellant in that the Constitutional rights of such persons can not be effectively vindicated except through an appropriate representative before this Court. *National Association for the Advancement of Colored People* v. *Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958). See, also, *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1935).

(v) *Statute and administrative regulation involved.*

(1) 42 U.S.C. Section 406:

"* * * The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this title, and any agreement in violation of such rules and regulations shall be void. . . ."

(2) 20 C.F.R. 404.976:

"An attorney who is admitted to practice before a court of a State, Territory, District, or insular possession, or before the Supreme Court of the United States or an inferior Federal Court, and who is not otherwise prohibited by law from charging or receiving such a fee, may upon petition therefor and good cause shown charge and receive such fee for services rendered in any proceeding under Title II of the Act before the Bureau of Old-Age and Survivors Insurance, or a hearing examiner, or the Appeals Council, * * * as may be approved by such Bureau, hearing examiner, or Appeals Council, respectively: Provided, that no such approval shall be required for charging

or receiving a fee for such services in a total amount not greater that the following: Representation before the Bureau only, $20; representation before a hearing examiner and/or the Appeals Council only, $30; representation before the Bureau and a hearing examiner and/or the Appeals Council only, $50. This limitation shall be applicable whether the fee is paid by a party to the proceeding or by someone else."

(c) QUESTIONS PRESENTED BY THIS APPEAL

(1) Is 42 U.S.C. Section 406(a) and administrative regulation issued by the Secretary of Health, Education and Welfare pursuant to such statute, 20 C.F.R. 404.976, repugnant to the Constitution of the United States in that claimants for Social Security benefits are thereby effectively deprived, in the prosecution of Social Security claims, of their right to retain counsel, as guaranteed by the Due Process clause of the Fifth Amendment?

(2) Is 42 U.S.C., Section 406(a) and administrative regulation issued by the Secretary of Health, Education and Welfare pursuant to such statute, 20 C.F.R. 404.976, repugnant to the Constitution of the United States in that such restrictions are an unreasonable encroachment on the judicial branch of Government, in violation of Article III, Section 2?

(3) Is 42 U.S.C., Section 406(a) and the regulation issued pursuant to thereto, 20 C.F.R. 404.976, an unconstitutional delegation of legislative power to an administrative agency?

(4) Do claimants for Social Security benefits have a Constitutionally protected right to counsel?

(5) Does the Due Process of Law clause of the Fifth Amendment permit either the Congress or the admin-

istrative branch of Government to enact rules and regulations, the necessary effect of which, is the systematic exclusion of privately employed trial lawyers from the prosecution of Social Security claims on behalf of citizens asserting such claims?

(d) STATEMENT OF THE CASE

The following is a summary of the allegations appearing in the Complaint:

Plaintiff is a licensed attorney engaged in the practice of law in Winston-Salem, North Carolina. He is an experienced trial lawyer and a specialist in trial and appellate litigation with over fifteen years experience. He has prepared and tried hundreds of criminal and civil cases and has appeared in more than forty appellate hearings in the North Carolina Supreme Court and in the Court of Appeals for the Fourth Circuit. He is a member of the bar of the United States Supreme Court, having been admitted to practice in that Court December 15, 1958. Appellant maintains a well equipped law office including a library valued in excess of $10,000.00. His library includes four multi-volume medical treatises and appellant expends in excess of $10,000.00 per year in the operation of his law office.

On October 1, 1965 plaintiff accepted employment as attorney for Mrs. Novella B. Holder, and agreed to prosecute, on her behalf, a claim against the Secretary of Health, Education and Welfare for Social Security benefits on account of total and permanent disability. Under the terms of the employment contract, it was agreed between plaintiff and Mrs. Holder that plaintiff would receive a fee, contingent upon recovery, in an amount equal to one-third of all past due benefits re-

covered. It was further agreed that if appellant were not successful in obtaining Social Security benefits for Mrs. Holder, no fee would be charged and appellant would receive no compensation whatever.

Prior to appellant's employment as attorney for Mrs. Holder, her application for Social Security benefits on account of total and permanent disability had been denied, by the Social Security Administration, on two occasions. Immediately upon accepting employment, appellant undertook a detailed examination of Mrs. Holder's file with the Social Security Administration and began assembling copies of appropriate medical documents relating to Mrs. Holder's medical teratment and hospitalization, originating as far back as the year 1957. After completing his investigation, appellant filed a Motion for Reconsideration with the Social Security Administration, on January 28, 1966. Attached to Mrs. Holder's Motion for Reconsideration were a number of medical records and affidavits. Appellant filed additional medical report with the Social Security Administration on February 24, 1966.

On April 8, 1966, the Social Security Administration advised Mrs. Holder that her Motion for Reconsideration was denied. This determination was communicated to appellant on about April 15, 1966. Thereafter, appellant sought and obtained, on behalf of Mrs. Holder, administrative review before a hearing examiner. Appellant presented evidence and contentions on behalf of Mrs. Holder at a hearing before the Hearing Examiner conducted in Winston-Salem, North Carolina on July 12, 1966.

On August 30, 1966 the Hearing Examiner handed down a decision favorable to Mrs. Holder, and under

the terms of which it was adjudicated that she was entitled to disability insurance benefits based on her application filed April 5, 1965. Appellant was later advised by the Social Security Administration that Mrs. Holder was entitled to receive monthly benefits retroactive to June, 1962.

On October 10, 1966, Mrs. Holder received a check from the Social Security Administration for past due benefits in the sum of $4,866.40. She was advised, about a week later, that she would continue to receive monthly benefits in the sum of $97.40.

After making inquiry to the Social Security Administration, appellant filed with the Hearing Examiner, on October 5, 1966, Petition for Order allowing counsel fees. Appellant requested approval of a fee of $1,577.33 (appellant's estimate as to one-third of the past due benefits to which Mrs. Holder was entitled) pursuant to his agreement with Mrs. Holder on October 1, 1965. Appellant's Petition for approval of attorney fees was verified, both by appellant and by Mrs. Holder.

On October 24, 1966, appellant received from the Honorable Charles M. Erisman, Chairman Appeals Council, ORDER-AUTHORIZATION TO CHARGE AND RECEIVE A FEE, under the terms of which he was authorized to charge and receive a fee of $750.00. This Order provided further:

> "This authorization merely permits the charging and receiving of a fee not in excess of such amount without subjecting said petitioner to the penalties provided in Section 206 of the Social Security Act, as amended. No fees are deducted from a party's benefits and the Social Security Administration assumes no responsibility for the payment of fees for services."

In addition to the past due benefits referred to above, Mrs. Holder has already received, as a direct result of legal services provided by appellant, an adjudication of her right to monthly benefits of not less than $97.40 for the remainder of her life. Mrs. Holder is thirty-eight years of age and has a substantial life expectancy. Appellant contends that the total value of her claim, including the right to future benefits, is well in excess of $25,000.00.

Appellant asserts that he is subject to criminal prosecution under the provisions of 42 U.S.C., Section 406(a) for having made an agreement with Mrs. Holder for compensation in excess of $30.00. He asserts further that he would be subject to further criminal prosecution under this Section in the event that he should charge and receive a fee from Mrs. Holder in excess of $750.00.

The reasonable value of the services rendered to Mrs. Holder during the prosecution of her claim for Social Security benefits is considerably in excess of one-third of the amount of the past due benefits recovered by Mrs. Holder. Appellant asserts that the purported action taken by the Social Security Administration is arbitrary and unreasonable; that in entering the Order of October 24, 1966 the Social Security Administration made no findings of fact as to any services performed by appellant, nor as to any basis upon which its action was taken.

Appellant, in his Complaint, further asserts, upon information and belief, that the Secretary of Health, Education and Welfare regularly denies more than 50,000 Social Security claims per month; that the vast majority of these claims are for total and permanent disability under Social Security Laws.

Appellant asserts that the attempted regulation of attorney fees, or the necessary effect of such regulation, is to discourage private attorneys from accepting Social Security cases and to indirectly prevent Social Security claimants from obtaining the assistance of retained council.

Appellant asserts further that the Social Security Administration regularly communicates directly to the claimant as to matters vitally affecting the prosecution of the claims and habitually ignores the fact that such claimants have retained private counsel who bear the primary responsibility for the prosecution of these claims. In all cases, unless otherwise directed by a United States District Court, the Social Security Administration mails checks for past due and future benefits directly to the claimant, even though the claimant is represented by counsel, thereby effectively destroying the attorney's common law lien upon the proceeds of recovery and rendering it difficult and sometimes impossible for attorneys to collect any fees at all with respect to their services.

In his Complaint, appellant made demand upon defendant to answer concerning the approximate number of Social Security claims denied during 1965 and 1966 and the approximate percentage or number of such claims in which practicing attorneys appeared. Defendant has steadfastly refused to provide this information.

Appellant contends that the unreasonable and arbitrary limitation upon attorney fees, the habitual refusal of the Social Security Administration to communicate with counsel retained by Social Security claimants, and the insistence of the Social Security

Administration to mail all checks directly to the claimants, rather than to their attorneys of record, are intended to prevent private attorneys from appearing in Social Security cases at either the administrative or the trial level of adjudication. Appellant contends further, that, if such practices are not so intended, their necessary effect is to impose such arbitrary and unreasonable restrictions upon private attorneys that attorneys will refuse to accept employment with regard to any such claims.

Appellant asserts that in the overwhelming majority of Social Security claims denied by the Secretary of Health, Education and Welfare, unsuccessful claimants are not represented by counsel. The practical effect of legislative and administrative regulation of attorney fees in Social Security cases, and of the other practices complained of, has been to deprive those citizens with claims for Social Security benefits of their right to have assistance of retained counsel; that in view of restrictions and practices referred to, experienced and qualified trial lawyers will not accept employment in claims for Social Security benefits on account of total and permanent disability.

Appellant asserts that such regulation and administrative practices are in violation of the Due Process of Law clause of the Fifth Amendment to the Constitution of the United States of America, in that Social Security claimants are indirectly, but effectively, deprived of their right to assistance of retained counsel in administraitve and judicial proceedings in the course of which Constitutional rights are being determined; that the Court should therefore declare legislation and administrative regulation of attorney fees in Social Security cases null and void and should

grant mandatory injunction requiring the Secretary of Health, Education and Welfare to communicate exclusively with attorneys representing claimants in Social Security cases and to discontinue any and all practices the reasonable effect of which is to deprive or limit claimants in Social Security cases of the right and opportunity of retaining private attorneys in connection with the prosecution of their claims.

In his Second Cause of Action, appellant asserts that the legislative and administrative regulations of fees chargeable by attorneys representing successful claimants in Social Security cases have, as their purpose and effect, the systematic exclusion of privately employed attorneys from participation in Social Security cases, both at administrative and trial levels. The resulting exclusion of attorneys from Social Security cases seriously impedes the administration of justice with regard to Social Security claims and is thus, an unlawful encroachment upon the judicial branch of Government by both the legislative and executive branches of Government, in violation of Article III, Section 2, of the Constitution of the United States of America.

In his Third Cause of Action, appellant asserts that Title 42 U.S.C., Section 406 is an unconstitutional delegation of legislative power to an administrative agency in violation of Article I, Section 1, of the Constitution of the United States of America, in that this Section purports to vest in the Secretary of Health, Education and Welfare, a discretion which is purely arbitrary and uncontrolled, this Section providing no standard for the guidance of the Secretary or any other administrative official. Appellant contends that no policy of law is declared and no legal principles are fixed. No rules

of conduct are prescribed to be applied to any statements of fact. This Section, instead, purports to confer upon the Secretary absolute power to fix whatever rule or standard he may, at his pleasure, deem appropriate, and a violation of whatever decree the Secretary may see fit to promulgate is declared to be a crime punishable by fine, imprisonment, or both.

Defendant moved to dismiss plaintiff's Complaint on the grounds that it fails to state a cause of action. This Motion was allowed by the District Court on September 11, 1967. In its written opinion filed on that date, the District Court said that even if Social Security claimants are being effectively deprived of counsel under the fee restriction complained of,

> "... this Court cannot accept the plaintiff's initial premise, which is that claimants for Social Security benefits have a constitutionally protected right to counsel in pursuing their claims through the administrative procedures of the Social Security System."

The District Court went on to declare that while the interest of a Social Security claimant is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process clause, *Fleming* v. *Nestor,* 363 U.S. 603, 80 S.Ct. 1367, 4 L.ed. 2d 1435 (1960), such benefits do not have the protection of an accrued property right, and:

> "... within the bounds of reasonable action, the Social Security System is a child of Congress and, as such, subject to its regulation. If for a valid reason, Congress can prohibit attorneys completely from the administrative processing of claims, then certainly Congress can subject attorney fees to regulation."

As to appellant's contention that the restriction on compensation of private attorneys violates Article III, Section 2 of the Constitution is an encroachment on the judicial branch of Government, the Court declared that these restrictions:

> ". . . do not relate to the regulation of fees of attorneys prosecuting claims before the court which might raise the question of encroachment on the judiciary. These restrictions relate only to attorneys' fees in connection with claims before an executive officer, thus precluding any question of judicial encroachment."

The District Court reached this somewhat interesting conclusion, notwithstanding Title 42, U.S.C.A., Section 405(g) which limits the power of the District Court to a review of the evidence taken in the course of administrative hearings and which provides that the Secretary's determination shall be conclusive, if supported by competent evidence.

In concluding, the District Court held that 46 U.S.C., Section 406 was not an unconstitutional delegation of legislative power and that Congress must be able to clothe executive officers with the discretion to fill in administrative details so as to accomplish the general purposes of legislation. The District Court observed further that:

> "... in order to insure flexibility in the administration of the legislation, no specific standards need be set for each subsidiary executive action."

Appellant's contention that the Secretary of Health, Education and Welfare has not prescribed by rule or regulation the maximum attorney fees as authorized

by statute, but has attempted to vest subordinate administrative officials with absolute discretion to arbitrarily fix such fees, was disposed of in like manner.

(e) REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

As far back as 1959, the Bureau of Old-Age and Survivors Insurance adjudicated 298,500 claims per month, of which 37,500 were denied. As of March 31, 1959, 189 disability cases were pending in the federal courts. These constituted sixty per cent of all Social Security cases so pending. *Kerner* v. *Fleming*, 2 Cir., 283 F. 2d 916 (1960), at 283 F. 2d 922, Note 10.

It is reasonable to assume that the volume of Social Security claims is today considerably larger than that reported by the Social Security Administration eight years ago. And yet only slightly more than 5% of all claimants for Social Security benefits are represented *by attorneys during* administrative stages of proceeding. See, THOUSANDS OF DISABILITY CASES NEED COMPETENT TRIAL LAWYERS, by Sherman L. Cohn, Associate Professor of Law, Georgetown University Law School, appearing in the February-March 1967 issue of TRIAL, published by the American Trial Lawyers Association, 6 Beacon Street, Boston, Massachusetts 02108.

The urgent need for assistance of competent legal counsel is evident from the large volume of decisions reported by federal courts in recent years. See Annotation, WHAT CONSTITUTES "DISABILITY" WITH FEDERAL SOCIAL SECURITY ACT, at 77 ALR 2d 641 (1961), including 1966 later case service. With regard to the overwhelming number of decisions in the original Annotation and later case service, appeals were taken

from administrative determinations adverse to claimant. In almost all of such decisions, either the District Court or the Circuit Court disapproved denial of benefits in administrative proceedings. In the vast majority of reported decisions, the claimant was unrepresented through administrative proceedings before the Secretary of Health, Education and Welfare.

The statute, 42 U.S.C., Section 406(a), provides a ridiculous maximum fee for compensation of counsel at the hearing level, where the determination may well shape the course of the remaining years of a tired life well spent, dedicatedly given, at the loom of industry. If the hearing examiner acts as judge, jury, persecutor of the claimant and advocate for the Secretary, the unrepresented claimant is beat before he starts. Chief Judge Hemphill in *Robinson* v. *Celebrezze,* W.D. S.C., 248, F. Supp. 149 (1965), at 248 F. Supp. 150.

Courts have no right to expect that parties in Social Security cases will normally have the assistance of counsel. Assistance by counsel is virtually an act of professional public service, in view of the severe restrictions as to attorney fees. Judge Leahy, in *Farley* v. *Celebrezze,* 3rd Cir., 315 F. 2d 704 (1963) at 315 F. 2d 705.

This Court ha sheld that the private attorney is not to be considered a menace to law enforcement in criminal cases and that he plays a vital role in the administration of criminal justice under our Constitution. *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.ed. 2d 694 (1966), at 384 U.S. 480, 86 S.Ct. 1631, 16 L.ed. 2d 694. See also, *United States* v. *Wade,* U.S. , 87 S.Ct. 1926, 18 L.ed. 2d 1149 (1967), at 87 S.Ct. 1938, 18 L.ed. 2d 1163. It has been held

further that a *state* cannot, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. *Brotherhood of Railroad Trainmen* v. *Virginia, supra,* at 377 U.S. 6, 12 L.ed 2d 93. Neither can a state prevent members of the public from advising one another as to employment of attorneys in civil cases or use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped. *Brotherhood of Railroad Trainmen* v. *Virginia, supra,* 377 U.S. 7, 17 L.ed. 2d 93-94. Neither can attempted regulation of the practice of law on grounds of champerty and maintenance be sustained where such regulations have the effect of infringing on liberties guaranteed by the First and Fourteenth Amendment to the United States Constitution. *National Association for the Advancement of Colored People* v. *Button, supra,* at 371 U.S. 438-439, 9 L.ed. 2d 421.

The paramount concern of appellant in this litigation is not that qualified attorneys are being unfairly treated or inadequately compensated. Rather, the issue that reaches out of this controversy and obscures all else is that spectre of a growing bureaucracy of administrative tribunals from which trained and experienced advocates are being systematically excluded, and growing numbers of our citizens are suffering their rights to rest at the mercy of whatever administrative official happens to be in command. The practicing lawyer, the traditional advocate of the unpopular cause who has been the cornerstone of the American legal system, has become less and less welcome as an active

participant in the judicial determination of Constitutional rights by administrative tribunals which seek to exercise, and are exercising, arbitrary and irreviewable judicial power.

Such is the blueprint for tyranny.

Respectfully submitted,

CLYDE C. RANDOLPH, JR.,
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APPENDIX A

(Received Sept. 11, 1967)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

No. C-242-WS-66

CLYDE C. RANDOLPH, JR., *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

APPENDIX

Clyde C. Randolph, Jr., Reece Bynum, William G. Pfefferkorn, and Jerry Dee Mobley, of Winston-Salem, North Carolina, for the Plaintiff

William H. Murdock, United States Attorney, and Richard M. Dailey, Jr., Assistant United States Attorney, of Greensboro, North Carolina, for the Defendant

Before J. Braxton Craven, Jr., United States Circuit Judge, Edwin M. Stanley, United States District Judge, and Eugene A. Gordon, United States District Judge.

PER CURIAM

In this action an individual attorney attacks as unconstitutional the statutes and regulatory provisions on the fees of attorneys representing claimants before the Social Security Administration.

participant in the judicial determination of Constitutional rights by administrative tribunals which seek to exercise, and are exercising, arbitrary and unreviewable judicial power.

Such is the blueprint for tyranny.

Respectfully submitted,

Of Counsel:

APPENDIX

APPENDIX A

(Received Sept. 11, 1967)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

No. C-243-WS-66

CLYDE C. RANDOLPH, JR., *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

Clyde C. Randolph, Jr., Renn Drumm, William G. Pfefferkorn and Jerry Dee Moize, of Winston-Salem, North Carolina, for the Plaintiff

William H. Murdock, United States Attorney, and Richard M. Dailey, Jr., Assistant United States Attorney, of Greensboro, North Carolina, for the Defendant

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Before J. BRAXTON CRAVEN, JR., United States Circuit Judge, EDWIN M. STANLEY, United States District Judge, and EUGENE A. GORDON, United States District Judge.

PER CURIAM

In this action an individual attorney attacks as unconstitutional the statutory and regulatory restrictions placed on the fees of attorneys representing claimants seeking social security benefits.

The plaintiff in his complaint filed December 16, 1966, seeks a declaratory judgment that 42 U.S.C. § 406(a)[1] and the administrative regulation issued by the Secretary of Health, Education and Welfare pursuant to such statute, 20 C.F.R. 404.976,[2] are void as being repugnant to the constitution, in that:

1. Claimants for social security benefits are effectively deprived, in the prosecution of social security claims, of their right to retained counsel as guaranteed by the due process clause of the Fifth Amendment.

2. These restrictions are an unreasonable encroachment on the judicial branch in violation of Article III, Section 2 of the Constitution.

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[1] 42 U.S.C. § 406:

"* * * The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this title, and any agreement in violation of such rules and regulations shall be void. . . ."

[2] 20 C.F.R. 404.976:

"An attorney who is admitted to practice before a court of a State, Territory, District, or insular possession, or before the Supreme Court of the United States or an inferior Federal court, and who is not otherwise prohibited by law from charging or receiving such a fee, may upon petition therefor and good cause shown charge and receive such fee for services rendered in any proceeding under Title II of the Act before the Bureau of Old-Age and Survivors Insurance, or a hearing examiner, or the Appeals Council, * * * as may be approved by such Bureau, hearing examiner, or Appeals Council, respectively: Provided, That no such approval shall be required for charging or receiving a fee for such services in a total amount not greater than the following: Representation before the Bureau only, $20; representation before a hearing examiner and/or the Appeals Council only, $30; representation before the Bureau and a hearing examiner and/or the Appeals Council only, $50. This limitation shall be applicable whether the fee is paid by a party to the proceeding or by someone else."

3. The statute is an unconstitutional delegation of legislative power to an administrative agency.

4. No valid and legally effective rule or regulation has actually been promulgated by the Secretary of Health, Education and Welfare as authorized by 42 U.S.C. § 406.

Plaintiff seeks an injunction against the United States of America to restrain enforcement of 42 U.S.C. § 406 and a mandatory injunction to compel the Secretary of Health, Education and Welfare to deal directly with attorneys representing claimants seeking social security benefits and to recognize and honor liens of attorneys for their fees.

The government in a motion filed April 17, 1967, moved to dismiss the complaint on the grounds that:

1. The complaint fails to state a claim against the defendant from which relief can be granted.

2. The plaintiff has no standing to bring the action and the complaint fails to allege a justiciable controversy.

The essential facts are as follows: On or about October 1, 1965, the plaintiff was retained by Mrs. Novella B. Holder to prosecute her claim for social security disability benefits on a contingent fee based on one-third of any past due benefits recovered. Mrs. Holders' claim had twice been previously denied by the Social Security Administration prior to plaintiff's retention and was again administratively denied on April 8, 1966. A hearing was requested on April 25, 1966, and held before a Hearing Examiner, on July 12, 1966. As a result, the claimant was found to have been under a disability since December 1, 1961, and subsequently received past due benefits in the amonut of $4,866.40. The plaintiff filed with the Social Security Administration Bureau of Hearings and Appeals a Petition For Order Approving Counsel Fees in which was noted the amount of work done and the complicated medical

problems involved in representing the claimant. The fee requested was $1,577.33, which was the plaintiff's computation of one-third of the total past due benefits. On October 24, 1966, the plaintiff received an authorization to charge a fee in the amount of $750.00.

DISCUSSION

At the outset, plaintiff concedes that statutes regulating the fees of attorneys appearing before administrative agencies have survived attacks which were based on the attorney's right to contract as guaranteed by the Fourteenth Amendment.[3] However, plaintiff asserts his challenge on more novel grounds: first, that the statute violates the due process clause of the Fifth Amendment which guarantees the claimant the right to counsel,[4] and secondly, that it encroaches on the powers of the judiciary as set forth in Article 3, Section 2 of the Constitution.[5] For insurance, two not so novel grounds are also urged upon the Court: that the statute is an unconstitutional delegation of legislative authority, and that a proper administrative regulation has not been promulgated by the Secretary of Health, Education and Welfare.

This Court finds that the statute survives these attacks despite their novelty and grants the defendant's motion to dismiss on the grounds that the plaintiff has failed to state a claim upon which relief can be granted.

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[3] *Calhoun* v. *Massey*, 253 U.S. 170, 40 S. Ct. 474, 64 L. Ed. 843 (1920); *Hines* v. *Lowrey*, 305 U.S. 85, 59 S. Ct. 31, 83 L. Ed. 56 (1938).

[4] Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

[5] Article III, Section 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . ."

In plaintiff's main thrust he asserts that every social security claimant has the constitutional right to counsel in administratively pursuing his claims, and that this right is thwarted by 46 U.S.C. § 406 and its progeny, 20 C.F.R. 404.976, which require that any attorney's fee larger than a very minimum figure must be approved by the Social Security Administration. The statute also provides for criminal sanctions if a greater fee is charged. The plaintiff contends that these statutory and regulatory restrictions of attorney's fees so effectively discourage attorneys from handling social security cases that the claimants are deprived of the assistance of counsel.

Even assuming *arguendo* that the plaintiff's conclusion, that claimants are effectively deprived of counsel under these fee restrictions is correct, this Court cannot accept the plaintiff's initial premise, which is that claimants for social security benefits have a constitutionally protected right to counsel in pursuing their claims through the administrative procedures of the social security system.

It is readily acknowledged that the interest of a claimant is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the due process clause. *Fleming* v. *Nester*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960). However, the Supreme Court in the above case also stated that such benefits did not have the due process protection of an accrued property right. Within the bounds of reasonable action, the social security system is a child of Congress and, as such, subject to its regulation. If for a valid reason, Congress can prohibit attorneys completely from the administrative processing of claims, then certainly Congress can subject attorney's fees to regulations.

As a practical matter, attorneys should be encouraged to assist in the presentation of complicated claims. The attorney's absence in such cases is lamented in a number of opinions which comment on the chaotic records of such

cases on appeal to the Federal Courts.[6] Nevertheless, if such fee restrictions place too great a burden on attorneys, the change in such restrictions should be attempted through legislative channels and should not be accomplished through judicial fiat when such restrictions do not offend due process.

Next, the plaintiff urges that these restrictions on attorney's fees violate Article III, Section 2, of the Constitution as an encroachment on the judiciary. However, these restrictions do not relate to the regulation of fees of attorneys prosecuting claims before the courts which might raise the question of encroachment on the judiciary. These restrictions relate only to attorney's fees in connection with claims before an executive officer, thus precluding any question of judicial encroachment.

The argument, that 46 U.S.C. § 406 is an unconstitutional delegation of legislative power because it provides the Secretary with full discretion to regulate attorney's fees, is without merit. It is well accepted that while Congress may not delegate the discretion of what a law shall be, it may lawfully delegate the discretion of how a law will be administered. The cases cited by the plaintiff to uphold his argument[7] have little persuasive force now in light of subsequent decisions. Congress can legislate only so far as it is reasonable and practical, and it must be able to clothe executive officers with the discretion to fill in the details so as to accomplish its purposes.[8] In order to insure flexibility in the administration of the legislation,[9] no specific standards need be set for each

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[6] *Farley* v. *Celebrezze*, 3 Cir., 315 F. 2d 704 (1963); *Butler* v. *Fleming*, 5 Cir., 288 F. 2d 591 (1961).

[7] *Panama Refining Co.* v. *Rhyne*, 292 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935); *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495, 55 S. Ct. 847, 79 L. Ed. 1570 (1935).

[8] *Carlson* v. *Landen*, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1951).

[9] *Yakus* v. *U.S.*, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

subsidiary executive action. The legislative intent of 46 U.S.C. § 406 is clear. Congress intended to allow the Secretary the discretion of setting maximum fees for services performed in connection with any claims before his Department. To require a strict standard to be set by Congress, would rob the Executive officer of the flexibility needed to properly administer the statutory scheme embodied in the Social Security Act.

Lastly, the plaintiff contends that the Secretary has not prescribed by rule or regulation the maximum attorney's fees as authorized by statute, but has attempted to vest his subordinate administrative officials with the absolute discretion to arbitrarily fix such fees. Since 20 C.F.R. 404.976 does not lay down strict standards to be followed in the determination of fees, the plaintiff asserts that it is not a valid rule or regulation. The flexibility needed in legislative enactment by Congress is no less needed in the promulgation of executive regulations. This discretion to set fees is exercised based upon a recommendation immunating from the level of the administration best able to judge what the proper compensation should be in each case, i.e., that division of the administration where the services were actually rendered. To require the Secretary to prescribe rigid standards in the setting of attorney's fees would serve to straitjacket the Social Security Administration in an area where adaptability is a continuing necessity.

Accordingly, an order will be entered.

/s/ J. Braxton Craven, Jr.
United States Circuit Judge

/s/ Edwin M. Ansley
United States District Judge

/s/ Eugene A. Gordon
United States District Judge

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

No. C-243-WS-66

CLYDE C. RANDOLPH, JR., *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

ORDER

The Court having considered the pleadings, motion of the defendant to dismiss, response to the motion to dismiss, briefs and the entire official file, and being of the opinion that the motion to dismiss should be allowed;

IT IS ORDERED:

1. That the motion of the defendant to dismiss is granted.
2. That each party bear his own cost.

/s/ J. BRAXTON CRAVEN, JR.
United States Circuit Judge

/s/ EDWIN M. ANSLEY
United States District Judge

/s/ EUGENE A. GORDON
United States District Judge